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CRIMINAL PROCEDURE IN ENGLAND, PART II.¹

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VIII.

ATTITUDE OF COUNSEL FOR PROSECUTION.

It has already been pointed out that prosecutions in England are of two kinds, public and private. In a public prosecution the government retains a barrister to act in that particular case. All the public prosecutions during a term of court may be conducted by different counsel, and it often happens that at a single term of court the same barrister may represent the Crown in some cases and the defense in others.

In public prosecutions counsel for the Crown is not a partisan whose sole aim is to convict. His function is to conduct an investigation to determine the guilt or innocence of the accused. In opening the case for the prosecution counsel generally states the circumstances favorable to the prisoner, as well as those tending to show his guilt. He also warns the jury of points of weakness in the prosecution's case; for instance, that the testimony of certain witnesses is open to suspicion. In cases where the prisoner's mental or physical condition is material, counsel for the Crown puts the prison doctor on the stand, and his testimony may dispose of the case in the prisoner's favor. If the prisoner has made a statement before the magistrate, this is read to the jury at the close of the evidence for the Crown as part of the prosecution's case. In some instances, when justice seemed to demand it, questions favorable to the prisoner were put to witnesses by counsel for the Crown. In the trial of *Rex v. Kusserow* (Central Criminal Court, July 19, 1910), where it seemed that the prosecuting witness was not telling a true story, counsel for the Crown examined the other witnesses in favor of the prisoner, asking several questions as to hearsay, for which he excused himself to the judge on the ground that he was doing it on behalf of the prisoner. In some cases where the prisoner pleaded guilty counsel for the Crown told of extenuating circumstances.

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The non-partisan attitude of the prosecution is more marked where the prisoner is undefended.

It is provided by statute that in certain cases counsel for the prosecution must give notice to the defendant of matters that will be proved at the trial. Thus, on an indictment for an offense for which drunkenness is a contributing cause, where the prosecution intends to prove that the defendant is an habitual drunkard, "unless evidence that the offender is an habitual drunkard has been given before he is committed for trial, not less than seven days' notice shall be given to the proper officer of the court by which the defendant is to be tried, and to the offender, that it is intended to charge habitual drunkenness in the indictment."⁴

Upon an indictment for receiving stolen goods, where the prosecution intends to introduce evidence of previous convictions of similar offenses for the purpose of proving that in the case on trial the defendant had guilty knowledge, seven days' notice in writing must be given to the defendant that it is intended to introduce evidence of the previous convictions.⁵ Where the prosecution calls witnesses whose depositions were not taken before the trial and whose names are not upon the back of the indictment, notice of intention to call such witnesses, with a copy of their evidence, should be given to the defendant and also to the trial court.⁶

Where the prosecution intends to introduce evidence, in accordance with the Prevention of Crimes Act, 1871, of a conviction for fraud or dishonesty, not less than seven days' notice must be given to the defendant.⁷

Counsel for the prosecution has the right to sum up the evidence to the jury except in cases where the prisoner is undefended and has been the only witness in his own behalf. This right is seldom exercised, especially where the evidence for the defense is only as to character. In general it may be said that counsel for the Crown sums up his case only where erroneous statements have been made which he wishes to correct, or when he desires to explain apparent contradictions in the testimony. In exercising his right to sum up the evidence, counsel for the Crown is forbidden by act of Parliament to comment upon the failure of the prisoner, or the wife or husband of

⁴Habitual Inebriates Act, 1898, 61 & 62 Vict., c. 60 (1).

⁵Prevention of Crimes Act, 1871, 34 & 35 Vict., c. 112, s. 19.

⁶Archbold, Criminal Pleading, 23rd ed., 415.

⁷Bowen-Rowlands on Criminal Proceedings (2nd ed.), 241.

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the prisoner, to testify.⁸ When the prisoner is undefended counsel for the Crown very rarely sums up the evidence.

Counsel for the Crown defers very much to the judge. Sometimes during the trial the judge is consulted regarding the order in which witnesses for the prosecution are to be called, and is even asked if further evidence need be introduced.

Counsel for a private prosecutor is more of a partisan than counsel for the Crown in a public prosecution, but can prejudice his case with judge and jury by a display of too much partisanship.

IX.

ATTITUDE OF COUNSEL FOR DEFENSE.

The attitude of counsel for the defense generally appears to be that of one who is endeavoring to bring out facts tending to disprove his client's guilt, rather than to confuse the issue so as to make a decision difficult, or to get error on the record which may be the basis of an appeal. This attitude is due to at least two causes,—one of which is the high standard of the profession; the other is the careful supervision by the judge of the proceedings of the trial.

Counsel for the prisoner is allowed and generally takes more latitude than counsel for the Crown, in the examination and cross-examination of witnesses, and in his remarks to the jury. He makes more frequent objections to the questions of opposing counsel. He is sometimes permitted to excuse the putting of questions otherwise objectionable on the ground that the case is an important and serious one. Thus, in one case counsel for the prisoner, who was asking a witness questions on collateral matters, when cautioned by the judge, replied: "It is a very important case and I am sure your Lordship will give me every possible latitude."⁹ Counsel for defense likewise has considerable freedom in summing up his case. "In summing up the evidence for the defense, the prisoner's counsel is not to be restricted merely to remarks on the evidence of his witnesses, but if anything occurs to him, which it is desirable to say on the whole case, he is at liberty to say it."¹⁰ The extent to which the prisoner's counsel is allowed a privilege not enjoyed by counsel for the Crown varies with the particular trial judge. There is also the following formal limitation: "In the opinion of the judges it is contrary to

⁸Criminal Evidence Act, 1898, 61 & 62 Vict. c. 36.

⁹Mr. Samuel in *Rex v. Ball* before Mr. Justice Ridley at the Central Criminal Court on July 21, 1910.

¹⁰Archbold, Criminal Pleading (23d ed), 211, citing *Rex v. Wainwright*, 13 Cox C. C. 171.

the administration and practice of the criminal law as hitherto allowed, that counsel for prisoners should state to the jury, as alleged existing facts, matters which they have been told in their instructions, on the authority of the prisoner, but which they do not propose to prove in evidence." (Resolution of Judges, November 26, 1881.) Counsel for the defense is permitted to cross-examine the prosecution's witnesses by suggesting to them, as true, facts which are inconsistent with the testimony of those witnesses, but which have not appeared in evidence.

X.

GENERAL COMMENTS ON COUNSEL.

In the trial of a criminal case in England there are comparatively few objections made to the questions of opposing counsel. This is due to two reasons; first, counsel does not endeavor to get before the jury inadmissible evidence by suggesting it in the form of a question; second, the opposing counsel does not generally object to questions which are only technically improper, if the merits of the case will not be thereby affected.

The practice of counsel is not invariably in accord with the above statement, but depends somewhat upon the temperament of opposing counsel, and the personal attitude of the trial judge. In one case there were many objections and much wrangling by counsel. In another case counsel for both sides indulged in considerable levity. Such cases, however, are rare exceptions.

The division of English lawyers into two classes, viz., barristers and solicitors, affects in some degree the proceedings in the trial of criminal cases. One advantageous feature of this division is that counsel are trained advocates, whose experience is confined to the trying of cases. They are specialists in this art, and are enabled to reach a high degree of efficiency. The traditions of this branch of the profession have influence in securing the proper trial of cases.

The division of the bar has also certain disadvantageous and unsatisfactory features. Counsel for the prisoner, for instance, receives his instructions from the solicitor, and very seldom has any communication with the prisoner himself. In many cases counsel has not consulted with the witnesses, and knows nothing of their personal characteristics before they appear on the witness stand. Although the solicitor may endeavor to inform counsel fully, many points arise in the course of the trial on which counsel has not been instructed. The prisoner and his counsel cannot communicate directly with each

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other during the trial, but must do so through the solicitor. It appears rather awkward, at least to one not accustomed to such procedure, to see the trial of a case interrupted while counsel leans over and puts a question to the solicitor, who goes to the dock and consults with the prisoner, and then returns with an answer to counsel.

In the Court of Criminal Appeal a number of cases were observed by us in which the counsel who argued the appeal had not represented the prisoner at the trial. In one of these cases the judges asked counsel several questions regarding certain facts of the case. To some of these he replied, "I do not know, as I did not try the case." To others he said, "I do not know, as I have not been instructed on that point."

Another feature of the division of the bar is that it involves the paying of a double fee by the client. It must be added, however, that this double fee is generally less than a single fee for the same services in the United States.

There are two exceptions to the general rule that a barrister can act for client only through a solicitor. "A dock defense, i. e., where the accused tenders 1l. 1s. or on some circuits, 1l. 3s. 6d. to a barrister for his services, and a defense undertaken at the request of the judge, are the only instances where, in contentious business, a barrister can act without the instructions of a solicitor. A barrister undertaking such a defense generally has an interview with the prisoner, and is allowed to use the Court copy of the depositions (if there are depositions), and such practically constitutes his brief."¹¹

XI.

FUNCTIONS AND ATTITUDE OF TRIAL JUDGE.

"It is the duty of a judge at the trial to determine all questions of law, and explain to the jury the law applicable to the case."

"Among the specific duties that a judge has to discharge at the trial of an indictment are—

"1. To decide any question (a) affecting the presentation, postponement or validity of the indictment; the competency of a witness; the admissibility of confessions, dying declarations, depositions or any evidence whatsoever; the execution of a document, and whether such is properly stamped or comes from the proper custody; (b) as to whether secondary evidence may be given of the terms of an original document; whether a document is privileged or otherwise protected from production; whether an alleged libel was published on a

¹¹Bowen-Rowlands on Criminal Proceedings (2d ed.), 89.

privileged occasion; (c) as to trade usage or custom; (d) as to whether certain acts amount to evidence of ownership; (e) as to whether there is any evidence to be left to the jury; (f) as to cross-examination and procedure generally.

"2. To point out to the jury the effect of statutes or documents on the case; the law as to presumptions and burden of proof; the law as to the uncorroborated evidence of accomplices, and generally 'to be a light to jurors to open their eyes, but not a guide to lead them by the noses.'

"3. To distinctly inform an accused of his right to give sworn evidence.

"4. At any time before verdict to allow the jury, if necessary, to view the *locus in quo*.

"5. To impose punishment.

"6. To order a person against whom a special verdict of insanity has been returned to be kept in custody as a criminal lunatic till his Majesty's pleasure shall be known.

"7. To decide any question as to bail; recognizances; postponement or adjournment of trial; discharge of jury; restitution; rewards; leave to appeal; statement of case for Court of Criminal Appeal; *certiorari* for indictments; *venire de novo*; costs."¹²

This is a good statement of the functions of an English judge in the trial of criminal cases, and shows how broad are the express powers which he exercises. In addition to the power to give rewards to those who have aided in the apprehension of criminals, the judge may award compensation to those who have been injured by the commission of a felony, and may order that the costs of one party to a criminal prosecution be paid either by the other party or by the county.

A clear and adequate conception of the exact position occupied by the judge in a criminal trial cannot be obtained from an enumeration of his official functions. This can be gotten only by observing and studying the practical exercise of these powers in actual trials, and by noting the individual characteristics of the judges. The results of such observations are here divided into two classes; first, the general powers and prerogatives exercised by all the judges; and second, instances of the exercise of what appeared to be special or unusual powers.

General Powers.—The presiding judge takes a very active part in the trial of criminal cases in England. He directs the proceedings

¹²Bowen-Rowlands on Criminal Proceedings (2d ed.), 251, 252.

at every stage, and is the active, controlling power throughout the trial.

In cases where counsel for the Crown states that he believes the evidence for the prosecution will not justify a conviction and therefore proposes not to call any witnesses, the judge insists on knowing the grounds for such belief, and will not permit the prosecutor to take this course, unless convinced that the ends of justice will be thereby served. The same is true where counsel for the Crown states he is willing to accept a plea of guilty to one count of an indictment and not to proceed on the others.

If the judge is of the opinion, at any stage of the proceedings, that upon the evidence presented the jury should not convict, he may stop the case and direct the jury to return a verdict of not guilty. In one case the judge told the jury he was of the opinion, on certain facts in the prosecution's case, that the guilt of the prisoner could not be established, and that the prisoner should be acquitted. The foreman of the jury replied that the jury took a different view of the facts in question and would like to hear more evidence. The judge then said that if a verdict of guilty should be brought in he would set it aside, whereupon the jury found the prisoner not guilty. In such a case it may be questioned whether the judge is not usurping the functions of the jurors, who are often in a better position to draw conclusions from facts of conduct than the judge.

Where there are several counts to an indictment the judge may rule at the close of the prosecution's case that the evidence presented will not support a conviction on certain counts. The jury is then told to confine its attention to the remaining count or counts.

The judge of his own initiative may call and examine witnesses who are not put on the stand for the prosecution or defense, and it lies in the discretion of the judge whether he will permit these witnesses to be cross-examined by either counsel.

During the examination of witnesses by counsel the judge often puts questions to the witnesses. This may be for the purpose of having a previous answer explained, or to bring out facts which were not shown during examination by counsel. In some of the cases heard, after a witness had been examined and cross-examined by counsel, the judge questioned the witness regarding the matters testified to. If the judge believes that a witness became confused during cross-examination, he will likely put questions to the witness for the purpose of clarifying the answers given.

The judge controls strictly the conduct of counsel throughout

the trial. Counsel are compelled to confine themselves to relevant and proper questions and are often required to explain why certain questions are put to the witnesses. In several cases the judge interrupted so frequently that counsel did not have the opportunity to develop his case in an orderly manner. In other cases during the examination of a witness by counsel the judge put questions to the witness, which counsel stated he intended to ask later. The evidence in most cases was introduced according to the view of the judge rather than that of counsel. Counsel were sometimes advised by the court regarding the order in which the witnesses were to be called, and were also told that it was not necessary to question certain witnesses who were called.

The English judge takes judicial notice of many matters which would have to be proved in our courts. Thus one judge said he would take notice without proof that in the Catholic Church throughout the world it is customary to baptize infants a few days after birth. Another judge took judicial notice of the fact that it is customary in English music-halls for the singers to invite the audience to join in the chorus.

The judge takes long-hand notes of the evidence, often writing down the testimony of witnesses *verbatim*. These notes form the basis for the judge's summing up and also during the trial seem to form the official record of the proceedings. If there is any dispute regarding a matter already given in evidence it is customary to have recourse to the judge's notes rather than to those of the shorthand writer. Much time is required in the making of these notes and a witness is often stopped in the midst of an answer to enable the judge to write down what has already been said. As most trials do not last an entire day, these notes are of more available use to the judge than a copy of the shorthand notes could be, because he can now sum up the evidence as soon as counsel have spoken to the jury. This he could not do if he were obliged to wait till a transcript of the shorthand notes was made.

Special Powers.—Some instances were observed of the exercise by the judge of a broader prerogative than was the general rule. In certain cases the judge expressed a forcible opinion on matters collateral to the issue of the trial. Thus one judge, after sentencing a defendant who had pleaded guilty to wounding his paramour, delivered a homily on illicit relationships. Certain judges during the trial expressed their opinions regarding the witness's testimony and even paraphrased several answers so as to color the meaning. In the

trial of a prisoner for murder, when the defense was insanity, a witness for the defense testified that the prisoner had on several occasions struck persons without provocation and had written a letter in which he stated he had set fire to his father's house in the hope that his father and step-mother would be burned to death. The judge then said, "He was about as evil a boy as you could meet, was he not?" The effect of a number of cross-examinations was weakened by the judge restating the answer of the witness given in direct examination, or by saying to the jury there was no weight to the point made by counsel who was cross-examining.

XII.

SUMMING UP BY TRIAL JUDGE.

After counsel have addressed the jury the judge reviews the evidence in detail, and directs the jury as to the law governing the facts. In this summing up the judge generally expresses his opinion regarding the weight and importance of the evidence. This has always been regarded as a very important function of an English judge. Hale, in his *History of the Common Law* (Chap. 12), "touching trial by jury" says, "Another excellency of this trial is this, that the judge is always present at the time of the evidence given in it. Herein he is able, in matters of law, emerging upon the evidence, to direct them, and also, in matters of fact, to give them great light and assistance by his weighing the evidence before them, and observing where the question and knot of the business lies; and by showing them his opinion even in matter of fact, which is a great advantage and light to laymen." The judge in summing up may also comment on the character and demeanor of the witnesses. Where an indictment permits conviction of an offense of different grades the judge indicates to the jury the degree of the offense warranted by the evidence. It is the duty of the judge to warn the jury as to the effect of particular evidence in certain cases. Thus, he must tell the jury it cannot convict on the uncorroborated evidence of an accomplice. Further, "where there are two or more persons jointly indicted and tried, and where the evidence against all is not identical, the judge should be careful in summing up to discriminate between them, and properly differentiate to the jury the cases against each of them."¹³ Where the circumstances warrant, it is the duty of the judge to explain to the jury the effect of a unsworn statement made by the pris-

¹³Bowen-Rowlands on Criminal Proceedings (2d ed.), 257, citing *Rex v. Warner*, 73 J. P. 53.

oner to the jury. "A judge may, in summing up, comment on the failure of the accused to give evidence on oath; and if the accused does give evidence, may comment upon his evidence."¹⁴ As already noted, counsel is not permitted to comment on the failure of the prisoner to testify.

The judge, in his summing up, generally endeavors to reduce the case to an issue and to call the attention of the jury to the parts of the evidence that are material in deciding this issue, leaving the jury free to determine the verdict. Most of the summings-up heard were of this character.¹⁵

In a few instances, however, the judge did not confine himself to the limits just indicated, but expressed a strong opinion regarding the guilt or innocence of the prisoner. In fact, in several cases observed by us, the judge practically directed a verdict of guilty, or not guilty. In the trial of an indictment for attempted murder where the defense claimed the injury was due to accident, the judge did not leave to the jury the alternative of acquitting, but said the question for them to decide was whether the prisoner had the intent to kill or merely to inflict serious bodily harm. In another case where the same offense was charged, the judge in plain terms told the jury to find the defendant guilty of wounding with intent to inflict serious bodily harm. In the trial of a defendant for murder, where the defense was insanity, the judge said to the jury, "You can do nothing else but find a verdict that the prisoner was guilty of the act, but not responsible."

XIII.

LEGAL AID FOR POOR PRISONERS.

"Where it appears, having regard to the nature of the defense set up by any poor prisoner, as disclosed in the evidence given or statement made by him before the committing justices, that it is desirable in the interests of justice that he should have legal aid in the preparation and conduct of his defense, and that his means are insufficient to enable him to obtain such aid—

(a) the committing justices, upon the committal of the prisoner for trial; or

(b) the judge of a court of assize or chairman of a court of quarter sessions, at any time after reading the depositions, may

¹⁴Bowen-Rowlands on Criminal Proceedings (2d ed.), 257, citing *Rex v. Rhodes*, L. R. (1899), Q. B. 77.

¹⁵Mr. Justice Coleridge, in *Rex v. Dickman*, the famous Newcastle "train murder case" made a remarkably able and fair summing-up of the evidence.

certify that the prisoner shall be entitled to have such legal aid, and thereupon the prisoner shall be entitled to have solicitor and counsel assigned to him, subject to the provisions of this act."¹⁶

About six months after the passage of this act the Home Office sent a circular of instructions to the magistrates based upon certain extracts from the charge of the Lord Chief Justice to the grand jury at the Warwick Summer Assizes, 1904. The Lord Chief Justice said in part: "The act was not intended to give a person legal assistance in order to find out if he had got a defense. He was not to have solicitor or counsel assigned to him for such a purpose. The governing principle of the act was that people who had a defense should have every inducement to tell the truth about it at the earliest opportunity. Assistance under the act could only be given where both (1) the nature of the defense as disclosed was such that in the interests of justice the prisoner should have legal aid to make his defense clear; and (2) where also his means were insufficient for that end.

. . . Magistrates should bear in mind that by a defense disclosed was meant not only a defense stated by the prisoner at the end of the hearing, but a defense disclosed on cross-examination, or by questions the prisoner might ask, or by remarks he interposed, or even in some cases such as might appear on the face of the evidence called for the prosecution. . . . The act was passed in the interests of innocent persons, and such would be advised in future not to reserve their defense but to disclose it at once, so that it could be investigated."

Judging this Act and its interpretation by the practice in many states in this country, it does not furnish adequate assistance to prisoners who have not the means to employ counsel. As it is provided in the Act that counsel shall be assigned only where it appears to the committing magistrate or trial judge that the prisoner has disclosed a good defense, it would seem to follow that whenever a prisoner is undefended at the trial, it would be apparent to the jury that the magistrate or judge believed the prisoner had no good defense. Upon inquiry as to this point, we were told that the jurors either did not know the terms of the Act, or if they did, that they would draw no conclusions from it. When one considers the average intelligence of the jurors, and the fact that the matter of the appointment of counsel is often discussed in open court, this answer is not altogether convincing.

¹⁶Poor Prisoners' Defense Act, 1903 (3 Edw. 7, c. 38, s. 1).

The Act leaves much to the personal discretion of the magistrates and judges. These differ in their personal attitude toward the general purpose of the Act, and are also influenced by the character of the offense. A further difficulty arises under the Act. Suppose the defense set up by the prisoner is negative, being a denial that he committed the act charged. If the magistrate believes the evidence is strong enough to justify a commitment, under the terms of the Act, it would seem to follow that he ought not to appoint counsel to defend the prisoner. Further than this, the Act puts a burden on the prisoner of knowing what may be a sufficient defense to the offense charged.

Apart from the provisions of the act, where there is a prosecution for a very grave offense, as murder or rape, the trial judge may appoint a barrister without pay to conduct the case for the prisoner. In such a case the barrister can act without the intervention of a solicitor.

Following are some of the cases heard by us at the Central Criminal Court, where the prisoner who had no counsel was convicted. *Rex v. Hill*—indictment for carnally knowing daughter under 13 years of age; sentence seven years penal servitude. *Rex v. O'Brien*—indictment for attempted murder; sentence, five years penal servitude. *Rex v. Maynard*—indictment for wounding wife with intent to murder her; sentence, eight months hard labor. *Rex v. Gray*—indictment for carnally knowing girl between 13 and 16 years of age; sentence, six months hard labor.

Though an undefended prisoner may cross-examine the witnesses for the prosecution, this often does him more harm than good, because it tends to prejudice the jury against him. Especially is this true where the offense charged is of a sexual nature.

In considering the position of the undefended prisoner the fact must not be overlooked that the judge still remains in theory what he was before the statutes allowing counsel in cases of felony were passed, viz.: counsel for the prisoner. In several cases, which we heard, where the prisoner was represented by counsel, the judge cross-examined the prosecution's witnesses, and in summing up to the jury brought out strongly the points in favor of the prisoner. In the case of one judge who presided at several trials, it seemed that the prisoner could not have been better defended had he been able to employ counsel. This, however, can not be said for all the judges.

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XIV.

PRISONER AT TRIAL.

Before the Criminal Evidence Act of 1898 (61 & 62 Vict., c. 36) a prisoner could not take the stand in his own behalf, but could make an unsworn statement to the jury from the dock. This Act reserved the privilege of making an unsworn statement, and gave the right to testify under oath. In practice, when the prisoner does not wish to testify under oath, a copy of his statement made before the committing magistrate is generally read to the jury. An undefended prisoner may cross-examine the prosecution's witnesses, and may call and examine witnesses in his defense. He may also address the jury.

XV.

FUNCTIONS OF POLICE.

The police play a very important part in criminal trials and render valuable aid in the administration of justice, in addition to the arrest and preliminary questioning of accused persons. It is one of the duties of the police to summon as witnesses at the trial all persons who know anything about the facts of the case. Some of those summoned in this way may testify for the prosecution and others for the defense. Such practice on the part of the police is often of great advantage to a prisoner in the defense of his case, as witnesses of whom he knew nothing may be thus brought to testify in his favor.

Before the trial of a prisoner the police make careful investigations regarding his reputation and record. The results of these investigations are in some cases put in evidence at the trial, and may materially affect the verdict. After every conviction and before sentence the police report to the judge full details of the prisoner's reputation and criminal record.

Much importance is attached to the testimony of the police. The fact that a witness is a police officer adds weight to his testimony. It is to be regretted that the reverse is often true in this country, where the testimony of the police is often viewed with suspicion by our juries, who hesitate to convict unless the testimony is corroborated by other witnesses.

Along with the merited praise that must be bestowed upon the English police, a recent scandal in this department must be noted.

On the hearing of the appeal of Alexander Dickman, convicted of murder on circumstantial evidence, the fact was brought out that before the trial the police permitted a witness, who later identified Dickman as the man seen with the deceased shortly before his death, to have a view of the prisoner through the crack of a door. The Court of Criminal Appeal in affirming the conviction disregarded entirely the testimony of this witness, and expressed strong disapproval of the action of the police.

XVI.

THE JURY AND THEIR VERDICT.

The manner of impanelling and the personnel of the jury have already been discussed. During the trial the jurors are very attentive and follow carefully the proceedings of the case. They sometimes ask that the answer of a witness be repeated, and even suggest that certain questions be put to witnesses.

The judge in summing up expresses his opinion of the evidence, and this is usually followed by the jury. If results from this that in most cases the jurors do not leave the jury box but render their verdict after a short consultation in the box. If the jury is convinced, at the close of the prosecution's case, or at any time during the presenting of evidence for the defense, that the prisoner is not guilty, the foreman stops the case and pronounces a verdict of acquittal. One particular jury attempted in an amusing way to exercise this power of rendering a verdict before the completion of the testimony. Before all the evidence for the prosecution had been presented, the foreman of the jury announced to the judge that it was not necessary to call any further witnesses as the jury was convinced that the prisoner was guilty. The jurors seemed disappointed when the judge told them they would have to hear the prisoner's story.

The jury has the power, when the facts are referred to them by the Court, to render a special verdict. The jury can not be compelled to do this, however, but may bring in a general verdict in all cases. There is a conflict of opinion among the modern authorities on criminal procedure as to whether the jury may render a special verdict, when the facts have not been referred to them by the judge. The more general view is that the jury has this power.

By the Trial of Lunatics Act 1883 (46 & 47 Vict., c. 38, s. 4, sub. sec. 1) a jury may render a special verdict when the commission

of the criminal act by the defendant, and his insanity at that time are both established by the evidence. The sub-section reads as follows: "Where in any indictment or information any act or omission is charged against any person as an offense, and it is given in evidence on the trial of such person for that offense that he was insane, so as not to be responsible according to law, for his actions at the time when the act was done or the omission made, then, if it appears to the jury before whom such person is tried, that he did that act or made the omission charged, but was insane as aforesaid at the time when he did or made the same, the jury shall return a special verdict to the effect that the accused was guilty of the act or omission charged against him, but was insane as aforesaid at the time when he did the act or made the omission."

XVII.

EXPEDITION.

The English courts have often been praised for the expeditious manner in which they dispose of criminal cases. "Expedition" in this connection may have two meanings, first, as regards the length of the trial, second, as regards the period which elapses between the commission of an offense and the final disposition of the case. As there are practically no challenges of jurors and as the judge exercises active control over the proceedings there is little waste of time during the trial. It must not be supposed, however, that all trials are concluded in a few hours. Some require several days. This is more than likely to be the case where the prosecution is private.

No exact rule can be laid down for all England as regards the time which elapses before an accused can be brought to trial. Within the jurisdiction of the Central Criminal Court this time is seldom more than a few weeks. In the country where an offense has been committed over which the assize court has jurisdiction there may be a delay of several months, as the assize court sits but four times a year. The Court of Criminal Appeal sits once a week except during the long vacation, so that the appeals can be disposed of in a very short time after conviction.

Following are some of the cases which we heard at the Central Criminal Court, tabulated so as to show the date of trial, the time which elapsed between the various proceedings, and also the length of the trial:

LAWSON AND KEEDY.

	Charge	Act Com- mitted	Date of Arrest	Date of Warrant	Date of Trial	Time of Trial	Verdict
1. Rex. v. Hill.	Rape	April 30	May 4	May 12	June 3	2½ hrs.	Guilty.
2. Rex v. Partridge	Murder	May 15	May 16	May 24	June 4	2 hrs.	Guilty but insane.
3. Rex v. Williams	Attempted Murder	May 6	May 7	May 26	June 6	4 hrs.	Guilty.
4. Rex v. Fulford	Carnally know- ing imbecile woman	.....	April 27	May 24	June 7	2 days	Not guilty
5. Rex v. Fake	Attempted murder	.....	May 9	May 23	June 10	2½ hrs.	Guilty.
6. Rex v. West	Rape	May 1	May 2	May 9	June 10	2 hrs.	Not guilty.
7. Rex v. Watson	Murder	March 4	April 8	April 29	June 4	2 hrs.	Guilty but insane.
8. Rex v. Higgin- bottom	Murder	May 2	May 3	May 3	June 4	2 hrs.	Guilty but insane.
9. Rex v. Maynard	Wounding with intent to kill	May 19	May 27	June 3	June 29	1½ hrs.	Guilty.
10. Rex v. Tippet	Arson	May 30	June 1	June 8	June 29	4 hrs.	Guilty.
11. Rex v. Hardy	Receiving stolen goods	.....	June 4	June 18	July 1	2 days	Not guilty
12. Rex v. Gray	Rape	May 22	July 8	July 8	July 19	2 hrs.	Guilty.
13. Rex v. Cronin	Sacrilege	July 4	July 5	July 8	July 19	1½ hrs.	Guilty.
14. Rex v. Kusserow	Shooting with intent to murder	July 15	July 16	July 16	July 19	2 hrs.	Not guilty
15. Rex v. Ball	Murder	June 25	June 27	July 4	July 20	2 days	Guilty but insane.
16. Rex v. Saxeby	Criminal Libel	.....	.....	March 4	June 8	8 days	Not guilty

XVIII.

THE COURT OF CRIMINAL APPEAL.

History of Criminal Appeal in England.

For over three-quarters of a century there was much agitation in England in favor of some form of criminal appeal. Twenty-eight bills on this subject were introduced in Parliament from the year 1844 to 1906. Some of these reached a second reading, and a few were even referred to committees, but the majority did not get beyond the first reading. Of these twenty-eight bills, twenty-three provided for the granting of new trials in certain instances, five allowed appeals against severity of sentence except when sentence of death was passed; six permitted increase of sentence; one only provided for appeal against illegality of sentence.

In 1894 the Council of Judges, held in accordance with the Supreme Court of Judicature Act, 1873, passed certain resolutions referring to the matter of criminal appeal. The Council recommended that there should be a Court of Criminal Appeal which should have the power of revising sentences by reducing or increasing them. It was also recommended that upon reference of a case to the Court by the Home Secretary the Court should have the power to quash a conviction or reduce sentence. The Council was strongly opposed to allowing a new trial, because it was thought this would be oppressive to a convicted prisoner. "If the first con-

viction is wrong the accused ought not to be put in jeopardy again."¹⁷

The demand for some form of review of criminal trials, which resulted in conviction, became much stronger after the Parliamentary investigation of the notorious Beck case in 1904, and in 1906 a bill was introduced by Lord Chancellor Loreburn, giving right to appeal to all persons convicted on indictment. The bill as originally drawn did not provide for a new trial, but it was later amended so as to include the right to a new trial when a verdict "is against the weight of evidence as understood in civil cases." After being further amended the bill passed the House of Lords. The amended bill was then sent to the Commons. Before it came to a second reading it was much criticized, both on principle and in detail. The greatest objection was to the provision for a new trial. It was urged that this amounted to double jeopardy, and that a prisoner should not be subjected to the oppression of a second trial. So strong was the objection to the bill in many quarters that it was not brought to a second reading.

XIX.

THE CRIMINAL APPEAL ACT.

The demand for a Court of Criminal Appeal continued, and on the 28th August, 1907, a bill introduced by the then attorney general (Sir J. Lawson Walton) became law under the name of the Criminal Appeal Act, 1907. The Act establishes a Court of Criminal Appeal composed of the "Lord Chief Justice of England and eight judges of the King's Bench Division of the High Court, appointed for the purpose by the Lord Chief Justice with the consent of the Lord Chancellor." (Sec. 1 (1).) The Court at each sitting must consist of an odd number, never less than three. (Sec. 1 (2).) The decision of the majority governs. (Sec. 1 (4).) No dissents are allowed, and one judgment only is pronounced, except in the cases "where, in the opinion of the Court, the question is a question of law on which it would be convenient that separate judgments should be pronounced by the members of the Court." (Sec. 1 (5).) The decision of the Court is final, except where at the instance of the director of public prosecutions or the prosecutor or defendant the attorney general certifies that "the decision of the Court of Criminal Appeal involves a point of exceptional public importance, and

¹⁷Resolutions of the Judges, quoted by Sir Harry Poland in his introduction to Cohen's Criminal Appeal Act, 4. This book was freely consulted in preparing this section on the history of criminal appeal.

that it is desirable in the public interest that a further appeal should be brought," in which case there may be an appeal to the House of Lords. (Sec. 1 (6).) This section does not give the prosecutor the right of appeal, where there is a verdict of acquittal, but simply permits him to secure a review of the judgment of the Court of Criminal Appeal where an appeal was brought before that Court by the prisoner.

XX.

KINDS OF APPEAL.

Three kinds of appeal are established by the Act. Sec. 3 reads, "A person convicted on indictment may appeal under this Act to the Court of Criminal Appeal—(a) Against his conviction on any ground of appeal which involves a question of law alone; and (b) with the leave of the Court of Criminal Appeal, or upon the certificate of the judge who tried him, that it is a fit case for appeal against his conviction on any ground of appeal which involves a question of fact alone, or a question of mixed law and fact, or any other ground which appears to the Court to be a sufficient ground of appeal; and (c) with the leave of the Court of Criminal Appeal against the sentence passed on his conviction, unless the sentence is one fixed by law," as sentence of death for murder. Sub-section (b) relating to the certificate of the presiding judge is elaborated in a rule of court which provides that: "The Judge of the Court of Trial may, in any case in which he considers it desirable so to do, inform the person convicted before or sentenced by him that the case is, in his opinion, one fit for an appeal to the Court of Appeal under Section 3 (b), and may give such person a certificate to that effect." (Rule 6 (b).)

No appeal is allowed from a conviction by the House of Lords (Sec. 20 (2)), nor can an appeal lie "from a conviction or indictment at common law in relation to the non-repair or obstruction of any highway, public bridge, or navigable river." (Sec. 20 (3).) The proceedings named in the section, though criminal in form, are recognized as civil actions.

XXI.

POWERS OF THE COURT.

The Court is given power to allow an appeal against conviction where the verdict is unreasonable and cannot be supported on the evidence, or where there was a wrong decision by the trial court on

a question of law, or where from any ground, there was a miscarriage of justice. (Sec. 4.) In all other cases the Court shall dismiss the appeal. It is provided, however, "that the Court may, notwithstanding that they are of opinion that the point raised in the appeal might be decided in favor of the appellant, dismiss the appeal if they consider that no substantial miscarriage of justice has actually occurred." (Sec. 4 (1).) The Court of Criminal Appeal has had recourse to this proviso many times, and has defined the phrase. "miscarriage of justice," in a number of cases. In the case of *Rex v. Meyer* (1908, 1 Cr. App. Cas. 10, 12) the Lord Chief Justice, referring to the proviso said: "That enables the Court to go behind technical slips and do substantial justice. Probably one test is that the facts proved should be consistent with innocence, and not consistent only with guilt." Again in *Rex v. Dyson* (1908, 1 Cr. App. Cas. 13, 15) the Lord Chief Justice said: "Here, as they [the Court of Criminal Appeal] could not substitute themselves for the jury, they could not positively say that there would be no miscarriage of justice; they could not say that the jury *must* have come to the conclusion that the death was accelerated by the previous assault.

* * * It was too serious in such a case to say that the jury must have come to a verdict of guilty." In *Rex v. Cohen and Bateman* (1909, 2 Cr. App. Cas. 197, 207) the Court of Criminal Appeal through Channell, J., rendered a written judgment construing section 4 along with the proviso:

"Taking section 4, with its proviso, the effect is that if there is a wrong decision of any question of law the appellant has the right to have his appeal allowed, unless the case can be brought within the proviso. In that case the Crown have to shew that, on a right direction, the jury *must* have come to the same conclusion. A mistake of the judge as to fact, or an omission to refer to some point in favor of the prisoner, is not, however, a wrong decision of a point of law, but merely comes within the very wide words 'any other ground,' so that the appeal should be allowed according as there is or is not a 'miscarriage of justice.' There is such a miscarriage of justice not only where the Court comes to the conclusion that the verdict of guilty was wrong, but also when it is of opinion that the mistake of fact or omission on the part of the judge may reasonably be considered to have brought about that verdict, and when, on the whole facts and with a correct direction, the jury might fairly and reasonably have found the appellant not guilty. Then there has been not only miscarriage of justice, but a substantial one, because the appellant has

lost the chance which was fairly open to him of being acquitted, and therefore, as there is no power of this Court to grant a new trial, the conviction has to be quashed. If, however, the Court in such a case comes to the conclusion that, on the whole of the facts and with a correct direction, the only reasonable and proper verdict would be one of guilty, there is no miscarriage of justice, or at all events no substantial miscarriage of justice within the meaning of the proviso, notwithstanding that the verdict actually given by the jury may have been due to some extent to such an error of the judge, not being a wrong direction of a point of law."

By this construction, "miscarriage of justice" means one thing where there has been an error on a point of law, and means another thing where there has been some other mistake. Finally in *Rex v. Stoddart*, (1909, 2 Cr. App. Cas. 217, 245) the Lord Chief Justice said: "We cannot say that the facts are inconsistent with his innocence. Attention was called upon this point to the judgment of the court in *Rex v. Dyson*, in which in delivering the judgment of the court dealing with this proviso I said we could not in that case say that if they had been properly directed the jury must have come to the conclusion which would have supported the conviction. We think it is open to consideration whether the word "must" is not too strong, and whether the proper question is not whether if properly directed the jury would have returned the same verdict."

The Court has applied the proviso of section 4 in a number of subsequent cases, but with no further attempt at construction, and with no reference to that already made.

Where there is an appeal against sentence the Court is given the power to diminish or increase the sentence appealed against. (Sec. 4 (3).) This section of the act seemed to meet with general approval, as it enables the Court to set a standard of sentences. Further, it was believed that the power of the Court to increase the sentence appealed against would tend to prevent frequent and frivolous appeals, as some risk was involved in such appeal.

The Court is given an unusual power by Sec. 5, (2) of the act, which enacts that "Where an applicant has been convicted of an offense and the jury could, on the indictment, have found him guilty of some other offense, and on the finding of the jury, it appears to the Court of Criminal Appeal that the jury must have been satisfied of facts which proved him guilty of that other offense, the court may, instead of allowing or dismissing the appeal, substitute for the verdict found by the jury, a verdict of guilty of that other of-

fense, and pass such sentence in substitution for the sentence passed at the trial as may be warranted in law for that other offense, not being a sentence of greater severity." This section gives the Court power to reduce the verdict to one of a lesser degree, as from murder to manslaughter, and also in some instances to substitute for the verdict found, that of guilty of a related offense, as in the case of a conviction for larceny to substitute a verdict of guilty of embezzlement. This section met with some criticism at first, on the ground that by it the Court of Criminal Appeal would exercise the powers of a jury. This fear was soon removed by the Court itself, which said a number of times that it would not on appeal retry the case.

If, however, on appeal it appears that one who was convicted of an offense was insane at the time the criminal act was done, the Court may quash the sentence imposed and order that the defendant be treated as a criminal lunatic under the Trial of Lunatics Act, 1883, "in the same manner as if a special verdict had been found by the jury, under that act." (Sec. 5 (4).) This is a case where the Court is in fact substituted for the jury.

The jurisdiction of the Court for Crown Cases Reserved is expressly vested in the Court of Criminal Appeal. This court has so far required two cases (*Rex v. Turner*, 1909, 3 Cr. App. Cas. 103 and *Rex v. Garland and Garland*, 1909, 3 Cr. App. Cas. 199) to be stated, in one of which (*Rex v. Turner*) the Court pronounced a very elaborate and well considered judgment, and extensive opinions were expressed by the individual judges during the course of the hearing. The Act permits the judges to render separate judgments in such cases. (Sec. 1 (5).)

"Writs of error and the powers and practice now existing in the High Court in respect of motions for new trials or the granting thereof in criminal cases, are hereby abolished." (Sec. 20 (1).) This is one of the most important sections of the Act, as it confines the power of the Court, except in the case of an appeal against sentence, to affirming or quashing the conviction. In commenting on this section of the act a recent writer (Sibley, Criminal Evidence and Appeal, 63) says: "It appears clear, that the abolition of writs of error effected by Sec. 20, sub sec. (1) of the Criminal Appeal Act has deprived a defendant in a criminal case of a right, that of having reviewed a judgment given against him on a general demurrer to an indictment by the judge before whom he took his trial."

Though the right to grant a new trial is expressly denied,

nothing is said in the Act regarding the ordering of a *venire de novo*. Whether the Court has this power is open to doubt. As already noted, the jurisdiction of the Court for Crown Cases Reserved is transferred to the Court of Criminal Appeal, but it was never definitely determined whether the Court for Crown Cases Reserved could award a *venire de novo*. The Court of Criminal Appeal has not been called upon to pass upon this question.

XXII.

METHOD OF APPEALING.

Notice of appeal must be given by appellant within ten days from the date of conviction. (Sec. 7 (1).) This time may be extended by the Court of Criminal Appeal, except in the case of a conviction involving sentence of death.

Full opportunities for appealing are given to all convicted persons. Governors of the prisons inform convicted prisoners of the right to appeal, and furnish them with instructions and forms for appealing.

In cases where an appellant must obtain leave of the Court to appeal it is provided that this leave may be granted by any one judge of the Court, "but if the judge refuses an application on the part of the appellant to exercise any such power in his favor, the appellant shall be entitled to have the application determined by the Court of Criminal Appeal as duly constituted for the hearing and determining of appeals under this Act." (Sec. 17.)

The Act gives the Home Secretary the power, where a petition is submitted to him having reference to the conviction of a person on indictment, to refer the whole case to the Court of Criminal Appeal "to be heard and determined as in the case of an appeal by a person convicted." (Sec. 19 (a).) The Home Secretary has availed himself of this privilege in three cases (*Rex v. Johnson*, 1909, 2 Cr. App. Cas. 13; *Rex v. Smith and Wilson*, 1909, 2 Cr. App. Cas. 271; *Rex v. Dickman*, 1910, 5 Cr. App. Cas. 135.) The trial of Dickman aroused much popular interest, as the prisoner was convicted on purely circumstantial evidence. The Court of Criminal Appeal, after a most careful and thorough consideration of the evidence on appeal, affirmed the conviction. The right of appeal in this case alone justified the creation of the Court of Criminal Appeal. The Home Secretary's prerogative of mercy is not affected by the Act. (Sec. 19.)

XXIII.

HEARING OF THE APPEAL.

The Act provides that shorthand notes shall be taken of the proceedings at the trial of any person who would have the privilege of appealing if convicted. (Sec. 16 (1).) Before this Act, no records other than the judge's notes were kept of the proceedings of the assize and quarter sessions trials. The shorthand notes are for the use of the judges of the Court of Criminal Appeal, and may be procured by any party interested by the payment of a small fee. It is also provided that the judge or chairman before whom a defendant is convicted shall, in case of a petition for leave to appeal or on appeal, furnish to the Registrar of the Court of Criminal Appeal his notes of the trial, "and shall also furnish to the registrar a report giving his opinion upon the case, or upon any point arising in the case." (Sec. 8.) The section providing for the taking of shorthand notes of the proceedings of the trial was due, in part at least, to a paragraph in the speech of Lord Alverstone, Lord Chief Justice, in the House of Lords, referring to the Criminal Appeal Bill, 1906. His Lordship said: "On what evidence is the Court of Appeal to act? Is it to act on the depositions? They are admissible as a *prima facie* case; but over and over again the most important points in favor of the prisoner or of the case for the prosecution are not brought out until the witness is examined and cross-examined at the trial. The judge's note, though it may be quite sufficient and well adapted to enable the judge to direct the jury who have heard the witnesses, would be wholly insufficient for the Court of Appeal. Are they then to act on a shorthand note?"¹⁸

The Court is given the power to recall any witnesses, who testified at the trial. It may also order the attendance of, and may examine any witnesses who could have been compelled to testify at the trial, but who were not called. The Court may also hear any competent witnesses who could not have been compelled to testify at the trial, for example the appellant himself. (Sec. 9 (b) and (c).) In this way the Court is given opportunity to investigate fully the merits of the appeal, and thus prevent a miscarriage of justice. Power is also given to the Court to have witnesses examined before a special commissioner, who reports to the Court. (Sec. 9 (d).)

The Court may at any time furnish an appellant with legal aid, when it appears that such is desirable, and when the appellant has

¹⁸Law Times, June 23, 1906.

not the means to employ counsel. (Sec. 10.) The appellant is given the right to be present at the hearing of his appeal, except when it involves a point of law alone, in which case he must obtain leave to be present.

On an appeal from a conviction in a private prosecution, the appeal may be defended by the private prosecutor. Where the prosecution was public, or where the private prosecutor does not defend the appeal, it is made the duty of the Director of Public Prosecutions to appear for the Crown. (Sec. 12.) In practice the private prosecutor seldom appears, there being a sentiment that for him to do so savors of persecution. His proper function is regarded as ended with the conviction of the accused.

"The Court of Criminal Appeal may, if it seems fit, on the application of an appellant, admit the appellant to bail pending the determination of his appeal." (Sec. 14 (2).) An appellant who is not admitted to bail undergoes a special form of imprisonment, prescribed in detail by the Act. (Sec. 14 (1).)

XXIV.

RULES OF COURT.

"Rules of Court for the purposes of this Act shall be made, subject to the approval of the Lord Chancellor, and so far as the rules affect the governor or any other officer of a prison, or any officer having the custody of an appellant, subject to the approval also of the Secretary of State by the Lord Chief Justice and the Judges of the Court of Criminal Appeal, or any three such judges, with the advice and assistance of the committee hereinafter mentioned." (Sec. 18 (1).) "The committee hereinbefore referred to shall consist of a chairman of quarter sessions appointed by a Secretary of State, the Permanent Under Secretary of State for the time being for the Home Department, the Director of Public Prosecutions for the time being, the Registrar of the Court of Criminal Appeal, and a clerk of assize, and a clerk of the peace appointed by the Lord Chief Justice, and a solicitor appointed by the President of the Law Society for the time being, and a barrister appointed by the General Council of the Bar." (Sec. 18 (2).)

In accordance with these sections of the Act rules of court were adopted, which reflect the wide interests of those who adopted them. As representatives of every class of persons concerned in the administration of the criminal law had a part in the drafting, the rules are

of great value in the situations to which they apply. The sections of the act regarding the drafting of rules show the various points of view that were considered in the framing of the act.

The rules are framed with a view to facilitate the carrying out of the provisions of the Act, and to render it properly advantageous to the appellant. Thus, Rule 39 (b) reads: "Where solicitor and counsel, or counsel only, are assigned to an appellant under the Act, copies of any documents or exhibits which they or he may request the Registrar to supply shall, without charge, be supplied unless the Registrar thinks they are not necessary for the purpose of the appeal." Rule 45 provides that "non-compliance on the part of an appellant with these rules, or with any rule of practice for the time being in force under the Act, shall not prevent the further prosecution of his appeal if the Court of Appeal or a judge thereof consider that such non-compliance was not wilful, and that the same may be waived or remedied by amendment or otherwise."

XXV.

COMMENTS ON COURT OF CRIMINAL APPEAL.

The Criminal Appeal Act was at first much criticized in many quarters on various grounds: (1) On principle, because there were those who believed that the whole idea of criminal appeal was wrong, the chief ground for such belief being that it was contrary to the precedent of many centuries. (2) That the right of a convicted defendant to appeal would tend to lessen the responsibility of jurors. (Lord Halsbury expressed this fear in a speech in the House of Lords on the second reading of the Criminal Appeal bill, 1906. It was felt by some that the jury, since its decision was no longer final, would not feel bound to weigh the case with the greatest care and give the prisoner the proper benefit of the doubt.) (3) That there would be frivolous appeals. (4) That the number of appeals would be overwhelming and that it would be necessary to appoint new judges to hear the many appeals.

The Court has been sitting nearly two years and a half and the experience of that time has shown that these critical fears were unfounded. Nothing has appeared to indicate that the jurors feel any less responsibility in considering their verdicts. If the prisoner's right of appeal has in any way affected the attitude of jurors, it has been in a favorable way, because as the jurors now no longer feel that what they are doing is remediless, they are less inclined to acquit improperly.

The Court is protected from frivolous appeals by the Act itself, especially by the provision requiring that the prisoner obtain leave to appeal in most cases. The power of the Court to increase the sentence in an appeal against sentence discourages improper appeals of that kind. Further, the power of the Court, in the case of an unsuccessful appeal against conviction, to order that the sentence shall date from the time of appeal instead of the date of conviction (Sec. 14 (3)), tends to prevent frivolous appeals against conviction. In *Rex v. Maurice* (1908, 1 Cr. App. Cas. 176, 177), the Court said that "its general rule is to make sentences date from the appeal."

Lastly, the Court has not been overwhelmed with the number of appeals. Since every convicted person has the right to appeal or to move for leave to appeal, one really wonders, notwithstanding the restriction against frivolous appeals, at the comparatively small number of appeals.

XXVI.

UNIFORMITY OF SENTENCE.

One of the chief objects of the framers and supporters of the present act was to secure something approaching uniformity of sentences for similar offenses. It was in part to secure this that the court was given the power to increase, as well as to reduce, the sentences appealed against. Great differences in sentences for similar offenses are generally due to the varied personal attitudes of the judges who impose the sentences. The way to remedy this is to subject the sentences to the supervision of a court whose own standard will not change. Thus in the report of the Council of Judges to the secretary of state in 1892 it was said: "As to sentences, the great object is to procure a greater uniformity than exists. A series of decisions by one Court would, by examples and the reasons given for them, tend to secure uniformity. The Court should, as far as possible, for long periods consist of the same Judges. It should be a permanent Court." The present act, though creating a court of nine judges, provides that the court shall be duly constituted if it consists of not less than three judges. In fact, the court in its sittings generally consists of that number. It often happens that the court in its successive sittings is composed of entirely different judges. It is doubtful if this can be called a "permanent court" and it is very questionable if uniformity of sentences can be secured by a court so constituted. The court, to lessen the effect of individual opinion among its members, laid down the rule in *Rex v. Sidlow* (1908, 1 Cr.

App. Cas. 28, 29), that it "would not interfere with a sentence unless it was apparent that the judge at the trial had proceeded upon wrong principles or given undue weight to some of the facts proved in evidence. It was not possible to allow appeals, because individual members of the court might have inflicted a different sentence, more or less severe." This restricted rule makes it difficult for the Court to secure uniformity of sentences.

As already noted, the Act expressly denies the court the right to order a new trial. In the case of an appeal against conviction the court must either affirm or quash the conviction. Where it appears on the hearing of an appeal that some serious error of law was committed in the trial, the court is obliged to quash the conviction even though the evidence at the trial strongly indicated the defendant's guilt.

The court in a number of cases has expressed a regret that it does not have the power to order a new trial in exceptional cases. In *Rex v. Dyson* (1908, 1 Cr. App. Cas. 13, 15), the Lord Chief Justice said: "It was much to be regretted that Parliament had not given the court power to order a new trial; such a power might only be wanted in a few instances; but this is one of them." In *Rex v. Joyce* (1908, 1 Cr. App. Cas. 142, 143), the Lord Chief Justice said: "This case brings into relief how extremely valuable the power in this Court to order a new trial would be. It would naturally be rarely exercised, but without it possibly crimes go unpunished when there has been a serious misdirection." In *Rex v. Hampshire* (1908, 1 Cr. App. Cas. 212, 213), the Lord Chief Justice said: "This is another case which illustrates the disadvantage under which this Court labors through not having the power to order a new trial." In *Rex v. Colclough* (1909, 2 Cr. App. Cas. 84, 85), Darling, J., said: "This case shows what a great advantage it would be if this Court had the power to order a new trial, for it is in such a case as this that we might consider whether the power should be exercised." In *Rex v. Stoddart* (1909, 2 Cr. App. Cas. 217, 245), the Lord Chief Justice in reading the written and considered judgment of the court said: "This appeal has brought out in strong relief the absolute necessity in the interests of justice of this Court having the power in exceptional cases to order a new trial. Such a power would be rarely exercised; but if there be in any case strong evidence upon which the jury, if properly directed, might have found a verdict of guilty, in the interests of justice the court should have the power to grant a new trial." Again, in *Rex v. Kams* (1910, 4 Cr. App. Cas. 8, 13), the

Lord Chief Justice said: "This case brings out in relief the real necessity in the administration of criminal justice that at times, in difficult cases, this court should have the power to order a new trial. I have called attention to that because from time to time, on rare occasions, it is seen that there are cases in which it would be very desirable that there should be further investigation, not so much for the purpose of clearing up difficulties as for the purpose of making it quite clear and plain that an innocent person has not been convicted." Finally, in *Rex v. Bloom* (1910, 4 Cr. App. Cas. 30, 35), the Lord Chief Justice said: "In this case we have a strong illustration of what we have had to observe many times, viz.:—the importance that this Court should have power to order a new trial. It is impossible for the Court properly to perform its duties without that power."

One who attends the hearing of a criminal appeal in England must be impressed by the knowledge which the Court displays of the record of the trial. It is very evident that before the hearing of the appeal the judges have studied and considered with the greatest care the shorthand notes and the trial judge's report. In fact, in several instances the judges showed greater familiarity with the testimony of the witnesses at the trial and the summing up of the trial judge than the counsel who was arguing the appeal.

The judgment of the Court is generally given immediately after the hearing of the appeal. This practice makes for speedy justice. If a difficult point of law is involved in the appeal, the Court will sometimes deliver a written and considered judgment. It is advisable that this be done, otherwise the carefully considered decisions of the old Court for Crown Cases Reserved may be overruled by hasty judgments.

From the opinions expressed by the judges during the hearing of appeals and from the judgments delivered, one is enabled to note several points on which the Court has developed a definite attitude. Thus the Court has discouraged appeals involving questions of fact, where the appellant might reasonably have been expected to testify at the trial, but did not.

On a number of occasions various judges of the Court of Criminal Appeal expressed strong disapproval, when it appeared that the appellant did not set forth his defense before the magistrate, but reserved it till the trial. In *Rex v. McNair* (1909, 2 Cr. App. Cas. 2, 4), the Lord Chief Justice said: "If a prisoner is ill-advised

enough to say at the Police Court that he will reserve his defense, thereby making it impossible for his story to be investigated before trial, it is no ground upon which we can interfere with the verdict. For an innocent man, the sooner his defense is raised the better." Again, in *Rex v. Maxwell* (1909, 2 Crim. App. Cas. 28, 29), the Lord Chief Justice said: "The jury were entitled to consider adversely to appellant his silence at the Police Court, and the fact that he reserved his defense."

One of the frequent grounds of appeal is that the trial judge wrongly directed the jury. The decisions of the Court of Criminal Appeal have resulted in improving the summings up of the trial judges, as a large percentage of the convictions quashed were due to improper direction by the judge. Now and then the Court of Appeal will make a strong intendment in favor of a summing up. Thus in *Rex v. Nicholls* (1908, 1 Cr. App. Cas. 167, 168), Channell, J., said: "It was true the learned judge had omitted to discuss the defense raised on behalf of appellant in his summing up. But if he had adverted to it he might have done so unfavorably."

The Court of Criminal Appeal has borne in mind the fact that the keynote of the Criminal Appeal Act is the securing of "substantial justice." The Court has not laid stress on technicalities either for or against the appellant. Thus, in some instances, counsel have been permitted to argue points not set forth in the notice of appeal, and on the other hand, in considering appeals against conviction the court has looked at the case as a whole and considered it upon its merits. In the hearing of the appeal of *Rex v. Jackson* (1910, 5 Cr. App. Cas. 22), it was shown that when the case for the prosecution was closed at the trial there was no evidence upon which a conviction could be supported. The chairman was not asked to take the case from the jury, but the prisoner put witnesses on the stand, and testified himself. From this testimony it clearly appeared that the prisoner was guilty, and the jury convicted. At the hearing of the appeal counsel for the appellant argued that the chairman should not have left the case to the jury. The Court of Appeal said that, as the point was not made at the trial, they would look at the case as a whole and from that it appeared that the appellant was guilty, hence the conviction ought to be affirmed. The Lord Chief Justice said: "On the point of miscarriage of justice we are entitled to look at the facts as a whole." The general attitude of the court can best be expressed in the words of the Lord Chief Justice in *Rex v. Stod-*

dart (1909, 2 Cr. App. Cas. 217, 246): "This court sits here to administer justice and to deal with valid objections to matters which may have led to miscarriage of justice."

The detailed results, compiled from the official reports, of the work of the Court of Criminal Appeal from its first sitting on May 15, 1908, to July 4, 1910, are as follows: Applications for leave to appeal and appeals from the order of a single judge refusing leave to appeal, 194. Of these 41 were granted, and 153 were dismissed. Appeals against conviction, 217. The court quashed 62 convictions and affirmed 155. There were 128 appeals against sentence. Sixty-one sentences were reduced, 1 was increased, 5 were quashed and 61 were affirmed. There were 19 petitions to call further evidence, of which 8 were granted and 11 refused. In one case the court adjudged the applicant "guilty, but insane."

XXVII.

RECOMMENDATIONS.

As a result of the study of the English criminal procedure we make the following recommendations:

1. All objections to the indictment should be made before evidence is heard, and errors in matter of form amended at once.

2. The prosecuting attorney and counsel for the defense should before trial consider and discuss the qualifications of the individual members of the jury panel and agree to the dismissal of any one clearly incompetent to be a juror.

3. The *voir dire* should be limited to the asking of questions strongly tending to show incompetency or bias in the present trial.

4. All prisoners on trial upon indictment, who are unable to employ counsel, should be furnished with legal assistance throughout the trial, including the arraignment.

5. The prosecuting attorney, instead of being a partisan, should investigate the case from a non-partisan standpoint, and should make an impartial presentation of the evidence to the jury.

6. The fee system, wherever it exists, for the compensation of prosecuting attorneys, should be abolished.

7. Counsel for the prisoner should defend him by endeavoring to disprove his guilt, and never by injecting error in the record.

8. The trial judge should not be a mere presiding officer, but should take an active and controlling part in the trial. He should restrict counsel to the asking of relevant questions. He should

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promptly overrule and discourage technical objections. He should never permit counsel to intimidate or improperly to confuse a witness. He should sum up the evidence to the jury and direct them as to the law applicable thereto.

9. New trials should never be granted for technical errors, but only to prevent miscarriage of justice.

10. Prosecutions for minor offenses, where the accused is not likely to evade the hearing, should be begun by summons, as in civil cases.